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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CLARENCE WYATT, Defendant and Appellant.	F042662 (Super. Ct. No. 676289-2) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne Ellison, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Robert P. Whitlock and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Clarence Wyatt stands convicted, following a jury trial, of second degree robbery involving the personal use of a deadly weapon (Pen. Code,[1] §§ 211,

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[1] Further statutory references are to the Penal Code unless otherwise stated.

12022, subd. (b)(1); count 1), attempted second degree robbery involving the personal use of a deadly weapon (§§ 211, 664, 12022, subd. (b)(1); count 2), and assault with a deadly weapon (§ 245, subd. (a)(1); count 3). Following a bifurcated court trial, he was found to have suffered two prior "strike" convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and two prior serious felony convictions (§ 667, subd. (a)(1)), and to have served four prior prison terms (§ 667.5, subd. (b)). Appellant was sentenced to a total determinate term of 11 years plus a consecutive term of 50 years to life in prison, and was ordered to pay a restitution fine of $10,000. He filed a timely notice of appeal and now raises various claims of error. For the reasons which follow, we affirm.

FACTS

On April 3, 2002, Traci Long was a restaurant manager for Taco Bell. As one of her regular duties was to take deposits to the bank, she went to the Bank of America branch at 5708 East Kings Canyon Avenue at approximately 9:45 that morning. As she approached the door to the bank in her Taco Bell uniform, she noticed a person standing in the alcove outside the bank entrance. He was African-American, around five feet three inches tall, and with a medium build. A beard and sideburns were painted on his face with what looked like black shoe polish. Long estimated his approximate age as between 25 and 30 years old, although it was difficult to tell because of the substance on his face. He was wearing a black hat with a bill on the front; dark pants; and a tan, button-down, short-sleeved shirt with white pinstripes that was like a uniform top, possibly from McDonald's. He was not wearing glasses, and his eyes were open very wide. His hair was short; because of the substance on his face, Long was unable to tell whether he had

facial hair.[2] Long exchanged smiles with him as she entered the bank. She did not recall anything unusual about his teeth, and in fact was not sure whether he showed his teeth.[3]

Long was in the bank for five to seven minutes, during which time she deposited money she had been carrying in a tan bank bag. The bank made change for her, so when she exited, she had $40 in four rolls of quarters, packaged in see-through plastic, in the bag. As she left, she could see the feet of someone in the alcove. She was almost to her car when she heard footsteps running up behind her. She turned; in front of her was the man she had seen as she entered the bank. He lifted up his shirt and showed her a gun in the waistline area of his pants. He told her to give him the bag; when she stuck it out to him, he grabbed it and told her to get in the car. She obeyed, and he told her to drive off. As she did so, she saw him standing where he had when he robbed her. He appeared to be staring across Kings Canyon.

Long telephoned 911 and then waited for the police to arrive. The first officer directed her back to the bank, where she saw an older man who was bleeding from the head. At the bank, she gave a description of the robber to a police officer. Seven to ten days later, she was shown a photographic lineup. There were two men of whom she was unsure, so she commented that it would be easier if they had beards. The detective drew a fake beard on a piece of paper and placed it over each photograph. She then selected number 3 (appellant). She was about 80 percent sure of her selection. At trial, she identified appellant as the robber. She was "absolutely positive" of her identification because of his eyes, which were the only thing she looked at when she was face to face with him.

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[2] Fresno Police Detective Gines, who interviewed Long, recalled her saying that the man had a light mustache.

[3] Appellant has significant gaps in his upper front teeth.

At approximately 10:00 a.m. on April 3, Dealouss Cox, who was 80 years old at the time of trial, went to the Bank America on East Kings Canyon and cashed some checks. After he left the bank, he was sitting in his car when a man walked up, laid a gun in his lap, and demanded his money. When Cox tried to talk the man out of robbing him, the man said he would give Cox five, and if he did not get the money by then, he would "hurt [Cox] bad." The man started counting; when he reached three, he struck Cox over the head with the gun, causing a large gash on Cox's left temple. Cox either hit or kicked the man, who ended up on the ground.[4] The man then got up and ran across Kings Canyon. He did not get any of Cox's money.

Cox went back inside the bank and had an employee contact the police. Cox described the man as African-American, 18 to 20 years of age, 5 feet 6 inches to 5 feet 8 inches tall, and 140 to 160 pounds in weight.[5] Cox did not notice what he was wearing or whether he had any kind of markings or scarring or makeup or facial hair. Cox was subsequently shown photographs; while he was able to eliminate some, he was unsure of others.[6]

Around 10:00 a.m. on April 3, Rufino Almeras had just pulled his car around the corner of the bank when he heard a car horn. He saw a man sitting inside the car and another one standing outside it. The man standing was African-American; as Almeras watched, he took off running, and then the older man got out of the car and walked

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4 Although the man's mouth was open, Cox did not notice anything unusual about his teeth. He did not notice whether the man had anything on his face. Cox did not look; he simply reacted.

5 Cox told Gines the man was possibly in his 30's.

6 According to Cox, he was not shown the same photographic lineup as other witnesses. Gines disputed this, and said Cox scanned the display of photographs and said he did not see the person. Cox appeared to Gines to be very nervous.

toward the bank. There was blood on his head. At no time did Almeras see the African-American man on the ground, although he could not see the two men at first because he was at the ATM machine.

The African-American man ran across Kings Canyon and behind an office complex. Almeras followed. He did not see the man almost get hit by a vehicle. He lost sight of the man for perhaps two minutes, and then saw him again in a parking lot. The man went behind some trees and an electrical transformer for a couple of minutes, then started running again. He ran down an alley in an apartment complex and Almeras lost him. This was about 10 minutes after Almeras first saw the man at the bank.

When the man ran from the bank, he was wearing dark gray pants and a yellowish shirt. He did not have anything on his head or any glasses. Almeras estimated the person was five feet six to seven inches in height. He was kind of stocky and had a mustache and short hair, and Almeras believed he was in his late 30's or 40's. Almeras did not see any black paint or polish on the person's face. However, he had what looked like a brown paper sack in his hand. He was limping as he ran.[7] When the man came out of the bushes by the electrical transformer, he was no longer wearing the same clothes. He now had on green shorts and a yellow T-shirt with short sleeves. He no longer had anything in his hands. Almeras was subsequently shown a photographic lineup and was able to identify appellant's photograph as the man. He was certain of his identification. At trial, he identified appellant as the person he followed. Almeras was certain of this identification.

Shortly after 10:00 a.m. on a Wednesday in early April, Valerie Pranger had just turned onto Kings Canyon from Sunnyside when she saw someone running as if being chased. He ran in front of her vehicle, and she slammed on her brakes and almost hit

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[7] Almeras told Gines that he limped as if he was tired of running.

him. He ran straight across into an apartment complex. The person had a white to beigeish bag in his hand. He was African-American and approximately five feet nine inches tall. He had a medium, muscular build, and medium to short, curly hair. He had nothing on his head, and was wearing fluorescent green gym shorts and a bright yellow tank top. She did not notice anything peculiar about his face, but she only had a quick view of it when he was right in front of her windshield and turned and looked at her. He appeared to be in his mid-30's, was medium-complected, and had marks along the jaw line that were darker than his skin and could have been facial hair or acne scars. Pranger subsequently viewed a photographic lineup and identified a photograph of appellant, with 90 percent certainty, as the person who had run across the street. At trial, she identified appellant as this person. She was 90 percent certain.

As of April 2002, Stephanie Moreno managed the apartment complex at 5770 East Kings Canyon. There were 112 units in the complex, and Samantha Session was one of the tenants. Appellant was her boyfriend. On a Wednesday in very early April, Moreno saw appellant walking on the front walkway toward the location of Session's mailbox. He was talking to the mail carrier, who was delivering the mail, and kept going back toward Kings Canyon and coming back again. This was around 10:30 a.m. Appellant was wearing green shorts and a yellow short-sleeved shirt and something gray and narrow around his neck.

On Wednesday, April 3, 17-year-old Herminia Sanchez, Moreno's daughter, was standing near the mail area, waiting for her mother. She saw appellant come from the front of the apartments. He was walking with a little girl who may have been Session's daughter. He did not look like he had just finished running, and Sanchez saw no type of unusual markings on his face. Sanchez did not notice he was limping, although she was not paying much attention to him. He asked for mail, but could not get it because he did not have a key. Then he left and walked back out the front of the complex to Kings Canyon. This took place between 10:30 and 11:00 a.m. Appellant was wearing a yellow

jersey-type T-shirt with black stripes on the arms, and green shorts. Sanchez had seen Session wearing sunglasses like those the police subsequently found, but not appellant.

On April 4, Fresno Police Detective Gines interviewed various people in connection in this case, including Almeras. Based on what Almeras told him, Gines went to the transformer and grove of trees at the rear of the complex at 5755 East Kings Canyon. He spotted a tan object, which looked like cloth, wedged inside one of the trees.[8] When he reached the tree, he noticed it was hollowed out. Inside the center he could see a tan shirt, what appeared to be a black pair of pants and black baseball hat, and the tip of what appeared to be a semi-automatic weapon. He then requested that an Identification Bureau technician respond. As a result, Laura Lathrop responded to the scene, processed it, and recovered the property. Lathrop seized a shirt, dark pants, sunglasses, a BB pellet gun, a hat, and a portion of a stocking. The items had been stuffed into the pants and shoved down into the base of the tree where the branches sprouted out. Lathrop was unable to recover fingerprints from any of the items.

At the time of these events, Samantha Session lived in an apartment at 5770 East Kings Canyon, Clovis. She and appellant had been boyfriend and girlfriend since October 2001; the relationship was rocky almost from the start, and by April 2002, she did not want him around. Sometime between the end of March and beginning part of April, she called the sheriff's department from a grocery store near her apartment and asked to have them come and get appellant because of an angry confrontation she had had with him.[9] When sheriff's officers responded, she told them about a possible

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[8] Fresno Police Officer Lyon and Gines had walked through the area on the day of the robbery and the morning of April 4, respectively, and had seen nothing of interest.

[9] When appellant was arrested on April 5, Deputy Vang, who booked him, asked his date of birth. Vang noted a birthdate of January 5, 1951, and reported that appellant was 51 years of age, although he did not look that old to Vang. (Indeed, the complaint in this

robbery, which she understood to have occurred the day before in the area of the Bank of America near her apartment.

Appellant had been spending time at Session's apartment as of the time she understood the robbery to have occurred. The night before she learned of the robbery from appellant, he spent the night there. He was lying on her sofa around 6:00 a.m. on the day she learned of the robbery. She went back to bed and next saw him around 10:00 a.m.[10] She heard some banging from her bedroom window and the front door. It was appellant; he was hysterical and told her to let him in. When she did, she noticed he was dressed in green gym shorts with a white shirt with something on it. There was black makeup smeared on his face from the sideburns down to the chin. He looked tired and appeared to have just finished running. He said someone was chasing him. Appellant handed her four rolls of quarters that were wrapped in clear plastic and asked her to get rid of the wrappers. He showed her a deposit slip and said he had just gotten through robbing a lady at the Bank of America and had gotten the quarters from her. He said he had used a gun.[11] He also said he tried to rob an old man there, but the old man would not let go of his bag so appellant hit him. When the old man still would not let go, appellant ran. Appellant said the lady had $1,500 in the deposit bag, which he had intended to get before she went into the bank. However, because it looked like there was

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case, as well as the certified documents from the Department of Corrections, gave appellant's birthdate as January 5, 1959, which would have made him 43 years old at the time of his arrest.) Appellant told Vang that he was five feet three inches tall and weighed 150 pounds, both of which appeared to be correct.

10 At some point, she opened the door to leave her room, but he closed it and told her that he needed her to stay in her room. She subsequently heard the door open and close. She came out of her room and he was gone. This might have been around 9:00 or 9:30.

11 Session knew appellant had a BB gun. She last saw him in possession of it less than two weeks before the robbery.

nothing in the bag, he waited until after she came out and missed the money he was aiming for.

Appellant quickly washed his face and shaved and changed clothes. He said he was going to go walk around to check out the area. He left with Session's young daughter and returned within 20 to 30 minutes. Session believed he left around 10:30 and returned close to 11:00. Session had received her check that day, so they both walked to a nearby liquor store to cash it. Session gave appellant money in exchange for the quarters because she needed quarters for laundry.

At the time of the robbery, Session had a McDonald's uniform, as she was getting ready to start her orientation for McDonald's. She last saw the uniform in her closet the night before the robbery. She did not see it afterwards. The uniform consisted of a tan button-up shirt, black pants, and a baseball cap with a McDonald's emblem. Appellant told Session that someone had been following him, and that he had placed her uniform, house key, and the gun in a bush near a building across the street from the bank. Appellant brought the key back when he went out with Session's daughter.

Gines interviewed Session on April 5. From her apartment, he collected a green pair of men's stretch shorts with the name "Wyatt" written on the pant leg, and a black eyeliner pencil that appeared to be broken. Session said the other piece was missing. Almeras and Pranger each subsequently identified the shorts. Gines showed Session some items. She identified her McDonald's uniform and hat. At trial, she also identified a part of her pantyhose. She had been getting ready to throw them away, but appellant thought they could be of some use and so cut a piece off. He put it on and practiced being a robber in front of her. She also identified appellant's sunglasses, but denied wearing them herself.

DISCUSSION

I

SHACKLING

Appellant contends his rights were violated, and prejudice ensued, when he was required to wear physical restraints during trial without an on-the-record showing of manifest need. We conclude he cannot complain of any error.

Approximately midway through trial, the court and counsel discussed procedural matters. This took place:

> "MR. TORRES [defense counsel]: The only thing that we'll be doing on our case is asking Mr. Wyatt to stand up and hold the pants or have him hold the pants up against his body.… If the Court allows that …, we're going to ask that he be unshackled so they won't be looking at the shackles that are tying his feet together.
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> "THE COURT: Is he shackled at the moment?
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> "MR. TORRES: Yeah, he sure is.
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> "THE COURT: I'm assuming – because the Court has not authorized it or directed that he be shackled, but you allowed that?
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> "MR. TORRES: Yeah. I have no problem with that, just as long at this point, the point that we request that he be unshackled so he can walk up here and allow the jury to view him. [¶] … [¶]
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> "THE COURT: Okay. Let me say this …, since this is the first time that I heard that Mr. Wyatt has been shackled, it is a good thing that I did not ask him to stand up and turn around during jury selection. I guess the point I want to make is, this is something you have taken up with the Sheriff's Department, that you have been in agreement with, and you're satisfied that these prospective jurors and jurors have not seen any shackling on the defendant?
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> "MR. TORRES: I'm not sure that they have not seen it, but I'm satisfied in talking to the deputy that the procedure was fine. I agreed to it. We're fine with that.
>
> "THE COURT: Okay. Good enough. This is shackling down below the counsel table that does have a modesty curtain, right?

"MR. TORRES: Yes."

"[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291, fn. omitted.) A defendant's record of violence does not by itself justify shackling. (*People v. Cunningham* (2001) 25 Cal.4th 926, 986; *People v. Duran*, *supra*, at p. 293; but see *People v. Medina* (1995) 11 Cal.4th 694, 730 [recognizing California Supreme Court cases which upheld shackling in situations involving defendants with a prior record of violence or who had displayed violent behavior in the courtroom].)

"The decision of a trial court to shackle a defendant will be upheld by a reviewing court in the absence of an abuse of discretion. [Citations.] When the record does not reflect 'violence or a threat of violence or other nonconforming conduct' by the defendant, a trial court's order imposing physical restraints will be deemed to constitute an abuse of discretion. [Citations.]" (*People v. Cunningham, supra,* 25 Cal.4th at p. 987.) While the trial court must make its own independent determination of the need for physical restraints and may not rely solely on the judgment of prison or court security personnel (*People v. Mar* (2002) 28 Cal.4th 1201, 1218; *People v. Hill* (1998) 17 Cal.4th 800, 841) or on "rumor and innuendo even if supplied by the defendant's own attorney" (*People v. Cox* (1991) 53 Cal.3d 618, 652), "[t]he court [is] not obliged to hold a formal evidentiary hearing on the matter, but [can] base its determination on factual information properly brought to its attention. [Citation.]" (*People v. Medina, supra,* 11 Cal.4th at p. 731.)

Here, the record does not reflect violence, a threat of violence, or other nonconforming conduct by appellant, or that the trial court made its own independent determination of the need for physical restraints. Accordingly, we normally would find an abuse of discretion. However, "[i]t is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant's failure to object

and make a record below waives the claim here. [Citations.]" (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583, affd *sub nom. Tuilaepa v. California* (1994) 512 U.S. 967.) Although appellant did not personally consent to the procedures employed (compare *People v. Majors* (1998) 18 Cal.4th 385, 406), defense counsel did. Appellant cites no authority for the proposition that he personally had to agree to the shackling in order for us to deem the issue waived.

In any event, were we to address the issue, we would find no prejudice. As the California Supreme Court explained in *People v. Tuilaepa*, *supra*, 4 Cal.4th at pages 583-584, "The guidelines imposed by *People v. Duran*, *supra*, 16 Cal.3d 282, 290, are intended, in large part, to avoid prejudice in the minds of jurors where a defendant appears or testifies in obvious restraints, or where the restraints deter him from taking the stand in his own behalf. We have consistently found an unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury. [Citations.] In [particular cases], we also found no evidence the restraints influenced the defendant's decision not to take the stand."

Here, there was no evidence appellant's shackles were seen by the jury. The table at which he was seated had a "modesty curtain"; significantly, the trial court itself was unaware appellant was shackled until defense counsel said something. Although defense counsel could not say with certainty that no jurors had seen the shackles, appellant points to nothing in the record to suggest otherwise or that, if seen, it was any more than a brief glimpse. "Prejudicial error does not occur simply because the defendant 'was seen in shackles for only a brief period either inside or outside the courtroom by one or more jurors or veniremen.' [Citation.]" (*People v. Tuilaepa, supra,* 4 Cal.4th at p. 584; *People v. Duran, supra,* 16 Cal.3d at p. 287, fn. 2.) There is nothing to suggest appellant was wearing shackles when his attorney had him stand and hold the black pants up to his body, or that the restraints were visible on the other occasions when defense counsel had him stand so witnesses could gauge his height. Appellant did not testify, and there is no

evidence he would have testified but for his restraints. (See *People v. Cox, supra,* 53 Cal.3d at p. 652.) Under the circumstances, and appellant's protestations to the contrary, "the procedures implemented could not have influenced … the … verdict. '[A]ny error was clearly harmless.' [Citations.]" (*Id*. at pp. 652-653.)

II

ADMISSION OF PLAN TO ROB ARBY'S EMPLOYEE

Appellant contends the trial court committed reversible error and violated his right to due process by admitting Session's testimony that appellant planned to rob an Arby's employee. We conclude that any error was harmless.

Prior to Session's testimony, appellant objected to admission of evidence that appellant said he had been "casing" an Arby's employee days before the charged offenses. Appellant contended the evidence was irrelevant and prejudicial. The court decided to hold a hearing outside the jury's presence to determine whether a reasonable inference could be drawn that this was the same person appellant ultimately was accused of robbing. Session subsequently testified, outside the presence of the jury, that on the day the charged incidents occurred, appellant told her that he had been watching a woman who worked for Arby's for about a week and "getting her time down." Session first testified that appellant told her the woman he robbed was the woman from Arby's he had been watching. She subsequently clarified that appellant never said he robbed the woman from Arby's, but that Session had assumed it was the same woman.

The prosecutor argued that the statement about the lady from Arby's was relevant to appellant's intent when he went to the bank, and that it did not matter whether he mistakenly or purposely chose another woman. Defense counsel countered that the probative value was low while the prejudice was very high, and that the jury would take it as evidence of appellant's character. The court termed the issue "a pretty close call," and noted that this was an identity case and that whoever approached Long at the bank intended to rob her. The court tentatively ruled that it would exclude the statement about

Arby's, but noted its ruling was subject to review after it heard Session's complete testimony.

Following Session's testimony on direct examination, the court determined that, given her claim that appellant said it looked like the woman victim had nothing in the bag when she entered the bank and so he missed the money he was planning for, evidence of what appellant said four or five days earlier was admissible under Evidence Code section 1101, subdivision (b) as being relevant to his plan. In light of the court's ruling, defense counsel elected to elicit the statement. Accordingly, in his cross-examination of Session, defense counsel brought out that she told Detective Gines that appellant had planned to rob an Arby's employee, and that he told Session about this plan four or five days before he told her that he had robbed a lady. Session testified that she did not remember exactly what appellant told her about his plan to rob an Arby's employee, but that he said he had been watching her and getting her time down when she went from Arby's to the bank to deposit the money from Arby's. Session also testified that she told Gines it was the Arby's employee appellant saw on the morning of the robbery, and that he did not think the lady had any money in the bag and so he waited until she came out. Session further testified that when appellant told her about the robbery, he did not say he robbed the lady from Arby's, but instead Session made that assumption. Defense counsel impeached Session with her testimony, given at the Evidence Code section 402 hearing, that appellant told her that he had robbed the lady from Arby's. Session explained that she must have misunderstood the question, and that she had assumed that was who appellant had robbed because that is what he had been talking about.

The court and counsel subsequently discussed fashioning a limiting instruction with respect to the Arby's employee evidence. The court observed that part of the evidence was conduct, while part was a statement of intent. Defense counsel ultimately decided not to ask for a special instruction, to which the court replied: "And I agree with that decision, frankly. I thought more about it, and it seems to me it is inadmissible under

[Evidence Code section] 1101(b), and it is also inadmissible by itself as a disposition of express intent to commit robbery, at least as a reasonable inference for the jury to draw that conclusion. And I agree with that decision as well and I think the limiting instruction is inappropriate here."

Appellant now contends the Arby's employee evidence was irrelevant, inadmissible pursuant to Evidence Code section 1101, subdivision (b), and should have been excluded under Evidence Code section 352. Respondent agrees the evidence was inadmissible under Evidence Code section 1101, subdivision (b), but contends the evidence in issue was not appellant's uncharged misconduct, but rather his statement, which was admissible as an admission pursuant to Evidence Code section 1220. Respondent further claims appellant's statement to Session was admissible for the nonhearsay purpose of supporting the inference that he acted in conformity with his plan to commit a robbery at Bank of America.

It is not clear from the record that the bases for admission upon which respondent now relies were raised in the trial court. In any event, any error in admitting the Arby's evidence was manifestly harmless. As the trial court noted, the true issue in this case was the perpetrator's identity, as whoever approached Long and Cox clearly intended to rob them.[12] Appellant contends, based on its requests for readback of portions of Long's and Pranger's testimony and the length of deliberations (in excess, he says, of seven hours), that jurors had difficulty with the eyewitness testimony. He says that "[i]f any juror had a reasonable doubt based solely upon the eyewitness testimony, but believed Session's testimony that appellant had previously planned to rob an Arby [*sic*] employee, the

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12 Although appellant's not guilty plea placed all elements of the offense in issue (*People v. Rowland* (1992) 4 Cal.4th 238, 260; *People v. Williams* (1988) 44 Cal.3d 883, 907, fn. 7), appellant ultimately did not dispute that the perpetrator intended to rob.

inference of identity was prejudicially established." He fails to explain, however, upon what basis jurors might accept a portion of Session's testimony while rejecting other portions. According to Session, appellant confessed to her that he committed *the charged crimes*. The jury either believed her testimony in this regard or it did not. If it believed the testimony, it was immaterial whether appellant previously admitted planning to rob an Arby's employee. If it did not believe Session's testimony concerning the confession, it was not likely to believe her testimony concerning anything else.[13] The testimony concerning the Arby's employee neither added to nor subtracted from Session's credibility, which defense counsel ably and repeatedly attacked.

Finally, even assuming the jury could somehow conclude Session was credible with respect to the plan, but not with respect to appellant's confession, we would not find cause for reversal. The erroneous admission of evidence constitutes grounds for reversal "only if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. [Citations.]" (*People v. Cooper* (1991) 53 Cal.3d 771, 836; *People v. Watson* (1956) 46 Cal.2d 818, 836; accord, *People v. Alcala* (1992) 4 Cal.4th 742, 797.) We reject appellant's contention that admission of the evidence violated his rights under the federal Constitution; even assuming error, the evidence was not "'of such quality as necessarily prevent[ed] a fair trial.' [Citation.]" (*Alcala v. Woodford* (2003) F.3d 862, 887.)[14]

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[13] Defense counsel recognized this when he told the jury, "Ms. Sessions is trying to make you think that [appellant] said all this and he did all this. But how can you believe everything? Everything out of her mouth has to be believed. Because if you don't believe one part, how can you believe the rest?" He also flatly asserted that "[e]verything that the woman says is a lie."

[14] The prosecutor did not, as appellant claims, "repeatedly exploit[ ]" Session's testimony concerning the Arby's plan in her argument to the jury. In fact, the prosecutor told the jury that Session's testimony was the "least important" of the evidence, while defense counsel termed her "probably the worst witness anyone has ever seen." With

III

OMISSION OF ACCOMPLICE INSTRUCTIONS

Appellant contends he is entitled to reversal because the trial court failed to instruct the jury on accomplice testimony with respect to Session. We find no error.

We note that the subject of accomplice testimony was never raised at trial. Nevertheless, "it is the duty of the trial court in a criminal case to give, on its own motion, instructions on the pertinent principles of law regarding accomplice testimony ""… whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice …."""" (*People v. Gordon* (1973) 10 Cal.3d 460, 466, fn. omitted.) "Section 1111 defines an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' In order to be chargeable with the identical offense, the witness must be considered a principal under section 31. That statute defines principals to include '[a]ll persons concerned in the commission of a crime … whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission.…' [Citations.] A mere accessory, however, is not liable to prosecution for the identical offense, and therefore is not an accomplice. [Citations.][15] [¶] If there is evidence from which the jury could find that a witness is an

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respect to the Arby's testimony, the prosecutor pointed to evidence the offenses were planned, and stated this was consistent with Session's statement that appellant said he had been watching the lady from Arby's. She also argued that Session's initial statement to Gines, that appellant had robbed the Arby's lady, was not a lie, but instead was based on an assumption she made because appellant had said he was watching the Arby's lady. These brief, mild references could hardly have prejudiced appellant, even assuming the Arby's evidence should not have been admitted.

15 Pursuant to section 32, "[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may

accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.] But if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony. [Citation.]" (*People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114; *People v. Fauber* (1992) 2 Cal.4th 792, 833-834.) "The burden is on the defendant to prove by a preponderance of the evidence that a witness is an accomplice. [Citation.]" (*Id*. at p. 834.) In this regard, the test is not whether the witness was subject to trial and conviction at the time he or she testified, but whether, at the time the acts were committed and as a result of those acts, he or she became liable to prosecution for the identical offense charged against the defendant. (*People v. Gordon*, *supra*, at p. 469.)

By her own testimony, Session was liable to prosecution for receiving stolen property (the quarters) and, possibly, being an accessory.[16] Neither made her an accomplice. At trial, appellant tried unsuccessfully to paint her as the actual perpetrator of the charged offenses. He was not entitled to accomplice instructions based on this theory, however, because his evidence in that regard "was not substantial but speculative. Substantial evidence is 'evidence sufficient to "deserve consideration by the jury," not "whenever *any* evidence is presented, no matter how weak."' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 369.) Apparently recognizing this fact, appellant now says the jury could have found Session aided and abetted the charged offenses "[i]n light of

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avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

16 Appellant requested, and the trial court gave, an instruction allowing the jury to consider Session's admission of knowingly receiving stolen property in determining her credibility as a witness.

Session's pre-existing knowledge of a robbery, her act and encouragement with intent to facilitate the commission when she helped [appellant] practice being a robber, her clothing's use in the offenses' commission, and her subsequent possession of and use of robbed property …."

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating, or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of a crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164; *People v. Beeman* (1984) 35 Cal.3d 547, 560.) Although insufficient alone to establish aiding and abetting, among factors which may be considered are presence at the scene of the crime, failure to take steps to prevent the crime, companionship, and conduct before and after the offense. (*In re Jose T.* (1991) 230 Cal.App.3d 1455, 1460; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094-1095.)

In the present case, at most the evidence showed Session knew appellant was planning to rob an Arby's employee. However, her knowledge that a crime might be committed by appellant in the future "did not amount to aiding and abetting the commission of that prospective crime. [Citations.]" (*People v. Horton, supra,* 11 Cal.4th at pp. 1115-1116.) There was absolutely no evidence Session knew in advance that appellant was going to dress in her McDonald's uniform or that she gave him permission to do so. Contrary to appellant's assertion, the evidence did not show that Session helped him practice being a robber, but merely that he took a piece of her discarded pantyhose, put it on, and practiced being a robber in front of her. That does not show an act or encouragement with intent to facilitate the commission of a crime on Session's part, nor could a jury so find without engaging in unwarranted speculation. Accomplice instructions are properly omitted when the evidence supporting them is not substantial, but merely speculative. (*People v. Lewis, supra,* 26 Cal.4th at p. 369.) Although her use of the stolen quarters implicated her, as we have noted, in the crime of receiving stolen

property and possibly as an accessory, neither would subject her to accomplice liability. (*People v. Horton*, *supra*, at p. 1116.) In short, the evidence was insufficient as a matter of law to warrant a conclusion by the jury that Session was an accomplice. Accordingly, the trial court did not err by failing to instruct the jury on the subject. (*Ibid.*)

Even if we were to conclude otherwise, however, we would not reverse. "[A] conviction will not be reversed for failure to instruct on these principles [governing the law of accomplices] if a review of the entire record reveals sufficient evidence of corroboration. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 966; see *People v. Horton*, *supra*, 11 Cal.4th at p. 1116; *People v. Fauber, supra,* 2 Cal.4th at p. 834.) "Corroborative evidence must come in by means of the testimony of a nonaccomplice witness. [Citation.] It need not corroborate every fact to which the accomplice testified or establish the corpus delicti, but is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. [Citation.] Corroborative evidence may be slight and entitled to little consideration when standing alone. [Citations.]" (*Id*. at pp. 834-835.) We have set out the other evidence in the statement of facts, *ante*, and need not repeat it here. It amply corroborates Session's testimony, in addition to which the jury was fully apprised of Session's possible bias against appellant and her motive to lie.[17]

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17 Appellant argues that to affirm based on sufficient corroborative evidence violates the Sixth and Fourteenth Amendments to the United States Constitution. The California Supreme Court has clearly and repeatedly spoken in this regard (see cases cited in *People v. Frye, supra,* 18 Cal.4th at p. 966), and we are bound to follow its holding (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

IV

CUMULATIVE ERROR

Last, appellant contends the errors in this case were cumulatively prejudicial and denied him his right to a fair trial. We disagree. "As explained above, to the extent the record establishes any errors in the proceedings, it also establishes that they were relatively minor and harmless. The record simply does not support a finding of cumulative error." (*People v. Majors, supra,* 18 Cal.4th at p. 431.) Appellant was entitled "to a fair trial, not a perfect one." (*People v. Box* (2000) 23 Cal.4th 1153, 1214.)

DISPOSITION

The judgment is affirmed.

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Ardaiz, P.J.

WE CONCUR:

_____
Levy, J.

_____
Gomes, J.